Ahmani Sdn Bhd v Abu Karim bin Baharom & Ors

HIGH COURT, MALACCA — CIVIL APPEAL NO 16-1 OF 1997
KN SEGARA J
20 DECEMBER 1999

Labour Law *— Employment — Director General of Labour — Power to inquire into complaints — Jurisdiction — Failure to examine complainant under oath or affirmation — Whether mere irregularity curable*

The Director General of Labour had made a finding requiring the company to pay wages to the department on behalf of its employees. The company filed an appeal against the decision of the director general and sought to question, inter alia, his jurisdiction to conduct the inquiry. The inquiry was conducted based on a report by a labour officer who recorded the complaint in the case book. The company argued that the director general had failed to examine the complainant 'on oath or affirmation' before the summons was issued which was mandatory under the Employment Act 1955 ('the Act').

Held, dismissing the appeal:

(1) The requirement, under s 70(b) of the Act for the director general to examine the complainant on oath or affirmation as soon as practicable after the complainant has presented a written statement of his complainant under s 70(a), is mandatory. However, whether a failure to administer the oath or to affirm the complainant before examining him can amount to a defect that went to jurisdiction which rendered all subsequent proceedings and steps taken under s 70 void, is a question that can be readily determined, upon a careful perusal of the Oaths and Affirmation Act 1949 (see p 463B–C).

(2) Section 12 of the Oaths and Affirmation Act 1949 clearly saves the entire proceeding that took place at the labour office Melaka and, therefore, despite the persuasive arguments that the complainant had not been examined on oath/affirmation, the said defect, if any, is a mere irregularity and, does not go to the root of jurisdiction. The irregularity, upon a consideration of the whole proceedings before the director general, has not occassioned an injustice to the appellant. The defect is not an illegality. The irregularity was more than sufficiently cured when all the evidence recorded on behalf of both the appellant and the respondent at the enquiry was in fact taken on oath, according to the record (see p 463C–F).

[Bahasa Malaysia summary

Ketua Pengarah Pekerja telah membuat penemuan memerlukan syarikat membayar gaji kepada jabatan bagi pihak para pekerja. Syarikat tersebut telah memfailkan rayuan terhadap keputusan

tersebut dan memohon untuk mempersoalkan, antara lain, bidang kuasanya untuk menjalankan siasatan tersebut. Siasatan tersebut dijalankan berdasarkan laporan seorang pegawai kakitangan yang mencatatkan aduan tersebut di dalam buku kes. Syarikat tersebut menghujahkan bahawa ketua pengarah telah gagal menyoal pengadu tersebut 'atas ikrar atau sumpah' sebelum saman dikeluarkan yang merupakan mandatori di bawah Akta Pekerja 1955 ('Akta tersebut').

Diputuskan, menolak rayuan tersebut:

(1) Keperluan, di bawah s 70(b) Akta tersebut untuk ketua pengarah memeriksa pengadu atas pengakuan sumpah atau ikrar secepat mungkin yang praktik selepas pengadu mengemukakan satu pernyataan bertulis tentang aduan beliau di bawah s 70(a), adalah mandatori. Namun begitu, sama ada satu kegagalan untuk mengendalikan sumpah atau untuk mengikrarkan pengadu sebelum memeriksa beliau boleh dikira sebagai satu kecacatan yang perlu bidang kuasa yang mengakibatkan semua prosiding dan langkah seterusnya diambil di bawah s 70 tak sah, adalah satu persoalan yang sudah pasti ditentukan, dengan satu penelitian yang cermat Akta Sumpah dan Ikrar 1949 (lihat ms 463B–C).

(2) Seksyen 12 Akta Sumpah dan Ikrar 1949 jelas menyelamatkan keseluruhan prosiding yang berlaku di pejabat buruh Melaka dan, oleh itu, walaupun terdapat hujah-hujah yang meyakinkan bahawa pengadu tidak diperiksa atsa sumpah/ikrar, kecacatan yang dikatakan, jika ada, hanya satu luar aturan dan, tidak pergi ke akar bidang kuasa. Luar aturan tersebut, dengan satu pertimbangan keseluruhan prosiding di hadapan ketua pengarah, tidak menyebabkan satu luar aturan kepada perayu. Kecacatan tersebut bukan suatu yang tidak sah. Luar aturan tersebut telah lebih daripada mencukupi dipulihkan tatkala semua keterangan yang direkodkan bagi pihak kedua-dua perayu dan responden semasa penyiasatan sebenarnya telah diterima atas sumpah, menurut rekod (lihat ms 463C–F).]

Notes

For cases on Director General of Labour, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 719–720.

Legislation referred to

Employment Act 1955 ss 60B, 60I, 69, 70(a), (b), (c), (g), Part XII
Oaths Act 1988 [Eng]
Oaths and Affirmations Act 1949 ss 6, 7, 9, 12

Appeal from: Labour Case No 46 of 1991 (High Court, Melaka)

Fatima Tahir Ali (*SF Pang & Chandra*) for the appellant.
Leela Chelvarajah (*Go Tiong Siew & Assoc*) for the respondents.

KN Segara J: This is an appeal from the order of the Ketua Pengarah Buruh made on the 8 April 1997 under s 69 of the Employment Act 1955 ('the Act') ordering the appellant/employer to pay to the Pengarah Buruh Melaka on behalf of the respondent/employees for:

(1) wages for working on rest day;

(2) wages for working on public holidays;

(3) wages in lieu of notice of termination;

amounting to RM19,705.39.

The appellant has raised as its first ground, in the memorandum of appeal, a very salient and important ground, that is jurisdiction. The appellant is going to the root of the entire enquiry and questioning the authority of the director general in conducting the entire proceedings. The point raised is under s 70 of the Act (and I quote the said s 70 of the Act to the extent relevant for the decision):

> The procedure for disposing of questions arising under ss 69, 69B and 69C shall be as follows:
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> (a) the person complaining shall present to the director general a written statement of his complaint and of the remedy which he seeks or he shall in person make a statement to the director general of his complaint and of the remedy which he seeks;
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> (b) the director general shall as soon as practocable thereafter examine the complainant on oath or affirmation and shall record the substance of the complainant's statement in his case book;
>
> (c) the director general may make such inquiry as he deems necessary to satisfy himself that the complaint discloses matters which in his opinion ought to be inquired into and may summon in the prescribe form the person complained against, or if it appears to him without any inquiry that the complaint discloses matters which ought to be inquired into he may forthwith summon the person complained against:
>
> Provided that if the person complained against attends in person before the director general it shall not be necessary to serve a summons upon him;
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> (d) ...
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> (e) ...
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> (f) ...
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> (g) ...
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> (h) ...
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> (i) ...

From the wording and the flow of the procedural sequence set out in s 70 of the Act, it is clear and unambiguous that before any summons in the prescribed form is issued against the party complained, the director general must examine the complainant on oath or affirmation (s 70(b) of the Act).

Page 2 of the record of appeal shows that there has been compliance with s 70(a) of the Act when a labour officer, that is one Mr C Pathmanapan

recorded the complaint of the respondents on 10 April 1991. A perusal of p 4 of the record of appeal shows that a labour officer proceeded to examine the complainant in purported compliance of s 70(b) of the Act, and recorded the complaint in the case book. The identity of this labour officer is not established as the record from p 4 onwards does not identify the signature of the officer in question, unlike the situation for the document in p 2, where the signature of the labour officer is identified as that of 'C Pathmanapan'. The labour officer who carried out the procedural requirement under s 70(b) of the Act has recorded as follows in the case book (at p 4 of the record of appeal):

> En Abu Karim bin Baharum *mengesahkan* dan bercakap dalam Bahasa Malaysia ... (Emphasis added.)

The appellant has taken issue over this and complains that the director general has failed to examine the complainant on *oath or affirmation*, as it is mandatory under s 70(b) of the Act, before the summons in the prescribed form is issued against the appellant (under s 70(C) of the Act) and, thereafter, an enquiry carried out in conformity with s 70(g) of the Act to decide on the matters in issue.

The Oaths and Affirmation Act 1949 (Act 194) ('the OA Act') in s 9 states:

> Oaths and affirmations made under s 6 or s 7 shall administered according to such forms and with such formalities as may be prescribed by the rules made by the Rules Committee and, until such rules are made according to the forms and formalities in use at the commencement of this Act.

Section 6 of the OA Act sets out the person by whom oaths are to be taken and s 7 of the OA Act allows affirmations to be made in lieu of an oath. According to *Jowitts Dictionary of English Law* (2nd Ed), the Oaths Act 1988, allows every person who declares that taking of an oath is contrary to his religious belief or that he has no religious belief to affirm, instend of taking an oath, in all places and for all purposes where an oath is required by law. A form of affirmation sufficient to satisfy requiremtn of the this Act is:

> I, AB solemnly and sincerely declare as follows '[or 'that as touching the matters in question I will speak the truth the whole truth and nothing but the truth'].

According to *The Concise Oxford Dictionary* (5th Ed):

> 'Oath' means a solemn appeal to or revered or dreaded person or object in witness that the statement is true;
>
> 'Affirm' means make affirmation, and 'affirmation' means solemn declaration by person who conscientously declines an oath.

Going by the *Istilah Undang-Undang* Edisi Semakan 1986 by Dewan Bahasa dan Pustaka, the appropriate word for 'oath' and 'affirm' in Bahasa Malaysia would be 'sumpah' dan 'berikrar', respectively.

The use of the word 'mengesahkan' means confirm and does not connote the gravity and solemnity conveyed in the administration of the

A oath or affirmation. In the grounds of decision, at p 129 of the record of appeal, the director general states at para 1.2 that the labour officer, Mr C Pathmanapan 'telah memeriksa (examined) pengadu dan 'on affirmation' mencatat kenyataan pengadu seperti kehendak s 70(b) Akta tersebut.', without establishing the basis for coming to the conclusion that the word 'mengesahkan' was in fact used in relation to an affirmation, by B the labour officer in question.

The requirement, under s 70(b) of the Act for the director general to examine the complainant on oath or affirmation as soon as practicable after the complainant has presented a written statement of his complainant under s 70(a), is mandatory. However, whether a failure to administer the oath or C to affirm the complainant before examining him can amount to a defect that went to jurisdiction which rendered all subsequent proceedings and steps taken under s 70 void, is a question that can be readily determined, upon a careful perusal of the OA Act. Now s 12 of the OA Act states:

> No omission to take any oath or make any affirmation, no substitution of any D one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

This provision in the Oaths and Affirmation Act 1949 clearly saves the E entire proceeding that took place at the labour office Melaka and, therefore, despite the persuasive arguments that the complainant had not been examined on oath/affirmation, I rule that the said defect, if any, is a mere irregularity and, does not go to the root of jurisdiction. The irregularity, upon a consideration of the whole proceedings before the director general, has not occassioned an injustice to the appellant. The defect is not an F ilegality. The irregularity was more than sufficiently cured when all the evidence recorded on behalf of both the appellant and the respondent at the enquiry was in fact taken on oath, according to the record (see pp 8–90 of the record of appeal).

The remaining grounds turn on the question as to whether the G appellant and respondents had entered into an agreement 'to be paid at an agreed rate in accordance with the task, that is specific amount of work to be performed, and not by the day or by the piece'.

Before the director general the point raised was initially:

> whether there was a 'contract of service' or a 'contract for service' and then H subsequently,
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> whether the work carried out by the respondents was 'task work' under s 60B, and
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> whether if it was in fact 'task work', it attracted the provisions of Part XII of the Employment Act 1955.

I From the notes produced from the case book, the appellant was not clear as to its own position in regard to the above issues. There was undisputed evidence that after the respondents had lodged their complaint against the

appellant at the labour office, the appellant had in 1991, some four to five years after the commencement of the employment of the respondents, attempted to get the respondents to sign a written form of contract, as shown in pp 214, 216 of the record of appeal, and marked as C10 and C11. A

Careful perusal of these documents establish certain facts, namely, B

(1) the respondents were employed by the appellant as bus drivers;

(2) they were to be paid monthly salary of RM500 [inclusive of extra time];

(3) EPF was to be paid by the employer on RM350, basic monthly pay;

(4) Sunday was a rest day on rotation; C

(5) paid public holidaus were Hari Raya Puasa and Hari Raya Haji; and

(6) one months's notice for termination of employmetn.

It appears that only the first respondent had signed the contract and, upon the refusal of the other respondents to sign this document, resulted in instant dismissal without any notice. The appellant contends that because it was agreed that the respondents be paid a lump sum of RM500 per month to drive the bus kilang ferrying workers to and from the factories for three shifts the situation is covered by s 60B of the Act and, is therefore, 'task work'. It has been further submitted that it does not attract the benefits provided in Part XII of the Act. D E

It is important to understand that certain types of work description may well fall into the frame envisaged by s 60B of the Act, for example, a driver employed by a family. The job entails the driving of the employer to and from the residence and the place of work and, the driver is bound to carry out the orders and directives of his employer. There may well be long hours of inactivity or standby. However, this does not mean that the employer is exempt from paying overtime, rest day and public holiday wages and such other benefits that may be provided in the Act. There is no magic in the term 'task work'. F

Clearly, even if the employer has agreed to pay at an agreed rate in accordance with the task as envisaged in s 60B, the Act does not exempt the employer from giving the employee all the benefits provided under Part XII of the Act, if the circumstances of the case so warrants. G

The director general has made a correct finding that the contracts between the respondents and appellant are contract of service and thus the respondents were entitled to the claims made by them. The director general has meticulously applied the formula provided in s 60I of the Act and has set the same out in detail in his grounds of decision. H

The appellant complains that the dates and figures were literally plucked out of the air by the director general, in particular, rest days and public holidays. This is untenable because the appellant was at all times duty bound to keep records as to rest days and public holidays. No documents or evidence pertaining to there were produced by the appellant to cast doubt on the respondents' testimony. In the above circumstances, I

A the appeal is dismissed with costs. The order of the director general is affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon

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